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SUPREME COURT, U.S.

Supreme Court of the United States

October Term, 1962

No. 28

[redacted]

Petitioner,

vs.

[redacted]

Respondents.

[redacted]

[redacted]

[redacted]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 222

PENSICK & GORDON, INC.,

Petitioner,

vs.

CALIFORNIA MOTOR EXPRESS, *et al.*,

Respondents.

Brief of Respondents Pacific Intermountain Express, a corporation, and Consolidated Freightways, a corporation, in Opposition to Petition for Certiorari.

Introduction.

By its sweeping characterization of the decision below, petitioner makes it appear that this case presents broad questions of substantive law. In reality, the only questions presented are narrow ones concerning the jurisdiction of the District Court, and, as the court below found, these questions are answered by prior decisions of this Court. Accordingly a grant of certiorari would not be warranted.

Opinion Below.

The opinion of the Court of Appeals (Petition App., p. 1 *et seq.*) is reported at 302 F. 2d 391.

Questions Presented.

Notwithstanding the decision of this Court in *T.I.M.E. v. United States*, 359 U. S. 464, 3 L. Ed. 2d 952, 79 S. Ct. 904 (1959), does the District Court have jurisdiction over the subject matter of a shipper's claim for damages against an interstate motor carrier arising out of the carrier's alleged unreasonable failure to render pick-up and delivery service:

(a) When complete diversity of citizenship exists?

(b) When diversity of citizenship does not exist?

Statement of the Case.

This action in its present posture is one for damages alone, although when commenced in the District Court injunctive relief was sought as well. Thus, when presented with respondents' motions to dismiss for lack of jurisdiction over the subject matter the District Court had before it petitioner's verified complaint and various affidavits submitted by both petitioner and respondents, which disclosed the following material facts:[1]

1. Petitioner, a wholesale distributor of toys, sells its merchandise to retail stores throughout the Western United States and regularly and customarily calls upon common carriers, including respondents, to deliver merchandise to it and to pick up merchandise consigned by it to its customers. It is, in the parlance of the trucking industry, a shipper. [1 Tr. 5, 6, 59-61; 2 Tr. 2d.]

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[1]Page references to the printed transcript of proceedings in Case No. 17235 in the court below will be preceded by the designation "1 Tr.", and references to the transcript of proceedings in Case No. 17380 by the designation "2 Tr." Respondent Pacific Intermountain Express will be referred to as "P.I.E.", and respondent Consolidated Freightways, as "C.F."

2. P.I.E. and C.F. are motor carriers holding certificates of public convenience and necessity duly issued by the Interstate Commerce Commission, engaged in the business of shipping goods and merchandise over federal and state highways in interstate commerce. [1 Tr. 5, 75, 83.]

3. On October 12, 1960, and continuing thereafter on October 13, 14, 17 and 18, 1960, petitioner's place of business was struck by petitioner's own employees. [1 Tr. 40, 42, 174; see also 2 Tr. 80, 86.]

4. The only known instances where either P.I.E. or C.F. allegedly failed to serve petitioner with either pick-up or delivery service occurred solely as a result of the refusal of the drivers involved to cross a picket line, maintained in connection with said strike, to serve petitioner, despite instructions from said respondents to do so. [1 Tr. 42, 77, 80, 84-88.]

The court below held that because the breach of duty complained of (the alleged failure to render service) resulted from the refusal of respondents' employees to cross petitioner's picket line at petitioner's plant, whether this alleged breach was actionable, by the very nature of those facts, depended upon the element of reasonableness or unreasonableness of the acts of respondents' employees in so refusing to cross the picket line. This, it held, demands the factual determination as to whether or not respondents failed to provide reasonable service without unjust discrimination as delineated in Sections 216(b) and (d) of the Motor Carrier Act [49 U. S. C., §§316(b), (d)]. [Petition App., p. 4, 302 F. 2d at 393.]

The question whether or not the District Court had jurisdiction to make this factual determination was found by the court below to have been answered by the decision of this court in *T.I.M.E. v. United States*, 359 U. S. 464, 3 L. Ed. 2d 952, 79 S. Ct. 904 (1959), and by its own decision in *Consolidated Freightways v. United Truck Lines*, 216 F. 2d 543 (9 Cir., 1954); cert. den. 349 U. S. 905, 99 L. Ed. 1242, 75 S. Ct. 582 (1955). The rationale of these cases was held to be directly applicable to the instant case. [Petition App., p. 4, 302 F. 2d at 393.]

In its original complaint petitioner predicated jurisdiction upon 28 U. S. C. Sections 1332 and 1337, but failed to support its claims of jurisdiction under Section 1332 with either general or specific allegations as to the existence of diversity of citizenship. It now concedes the absence of diversity of citizenship with respect to respondents P.I.E. and C.F., and predicates the existence of jurisdiction of its claim against them solely on the theory that its claim arises under an Act of Congress regulating commerce. [Petition, pp. 6-7.]

ARGUMENT.

I.

Jurisdiction of Petitioner's Claim Must Necessarily Be Predicated Upon the Existence of a Private Civil Remedy Against a Motor Carrier for Failure to Perform the Duties Enumerated in Sections 216(b) and (d) of the Motor Carrier Act.

As noted above, diversity of citizenship did not exist as between petitioner, on the one hand, and respondents P.I.E. and C.F., on the other hand. Thus, if jurisdiction exists with respect to the subject matter of petitioner's claim against these respondents, the predicate for it must be found, under 28 U. S. C. Section 1337, in some Act of Congress regulating commerce.

Petitioner must therefore demonstrate the existence of a private right of action under the Motor Carrier Act, the only Act of Congress involved, and, specifically, the existence of such a right under Sections 216(b) and (d) thereof [49 U. S. C., §§316(b), (d)].

II.

This Court Held Squarely in T.I.M.E., v. United States That There Is No Private Civil Remedy Available Against a Motor Carrier for Failure to Perform the Duties Enumerated in Sections 216(b) and (d) of the Motor Carrier Act.

In *T.I.M.E. v. United States*, 359 U. S. 464, 3 L. Ed. 2d 952, 79 S. Ct. 904 (1959), the United States as shipper of certain goods in interstate commerce challenged in postshipment litigation the reasonableness of motor carriers' charges made in accordance with tariffs

governing the shipments. The Courts of Appeals held that the right of the United States to resist claims for payment was derived from the common law and preserved by Section 216(j) of the Motor Carrier Act. In the Supreme Court the United States defended this ground of decision, but relied principally upon the proposition that the Motor Carrier Act itself created a judicially enforceable right in a shipper to be free from the exaction of unreasonable charges as to past shipments even though such charges reflected applicable rates duly filed with the I.C.C. The government conceded that the question of reasonableness of past rates could not itself be decided in the courts, but took the position that when such questions arise in court litigation this did not deprive the court of jurisdiction. Rather, it argued, these questions should properly be referred to the I.C.C. for decision and the results of that adjudication used to determine the respective rights of the litigants (359 U. S. at 468). Thus, two questions were presented:[2] (1) whether such judicially enforceable right arises under the Act; and, if not, (2) whether under the common law the District Court has the power to award damages for past unreasonable conduct of a motor carrier after the determination of unreasonableness has been made by the I.C.C.[3] The answer of the Supreme Court to both of these questions was negative.

As to the first question, this Court noted that, as in the instant case, the statutory provisions involved

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[2]Since this question arose in an action against the United States under the Tucker Act, 28 U. S. C. A. §1346(a)(2), no question of diversity of citizenship was presented.

[3]We do not mean to suggest that such a determination has been made in this case; indeed, no aspect of this controversy has ever been brought before the I. C. C.

were Sections 216(b) and (d) of the Motor Carrier Act [49 U. S. C. §§316(b), (d)] and stated:

> "The government urges that this language imposes a statutory duty on motor carriers not to charge or collect other than 'reasonable' rates, and asks us to imply a cause of action under the Motor Carrier Act for any shipper injured by violation of that duty. We cannot agree." (359 U. S. at 469.)

In support of this conclusion, this Court made these points, all applicable to the instant case:

1. The standards of reasonableness established by these provisions of the Act create criteria for administrative application and not justiciable legal rights (citing *Montana-Dakota Utilities Co. v. Northwestern Pub. Serv. Co.*, 341 U. S. 246, 251) (359 U. S. at 469-470).

2. The express provision for a private remedy in Parts I and III of the Interstate Commerce Act and the conspicuous absence of any corresponding provision in the Motor Carrier Act (which was enacted as Part II of the Interstate Commerce Act) demonstrates congressional intent that there be no private remedy for violation of any of the provisions of the Motor Carrier Act (359 U. S. at 470-471).

3. The I.C.C. itself recognized the absence of a private remedy for violation of the provisions of the Motor Carrier Act and twice recommended amendatory legislation, which Congress twice rejected (359 U. S. at 471).

The government urged further that even if the Motor Carrier Act did not confer the claimed right, the Act, and particularly 216(j) thereof [49 U. S. C. 316(j)], must be read to preserve a pre-existing common law

right. The argument was that although the doctrine of primary jurisdiction requires reference of questions of reasonableness to the I.C.C., the common law may nevertheless be vindicated in a suit in the courts. This Court rejected this contention as well, pointing out that Congress, in declining to establish a direct reparations procedure, could not conceivably have intended the circuitous procedure advocated.

III.

The Court Below Correctly Applied the Rule of T.I.M.E. v. United States.

Petitioner contends that the decision of the court below represents an unwarranted extension and misapplication of *T.I.M.E. v. United States.* It apparently does not take issue with the determination of the Court of Appeals that the duty of respondents to serve, whether predicated upon the common law or upon statute, is measured by a standard of reasonableness; indeed, petitioner has conceded this throughout this litigation. [See, *e.g.* 1 Tr. 127; 2 Tr. 246.] Rather, petitioner seemingly contends that questions bearing upon the reasonableness of a carrier's refusal to serve should not be reserved for administrative determination. It bases this contention, not upon any claimed error in the decision of the Court of Appeals, but rather upon a "host of consequences" which, it claims, will flow from this decision. These consequences, petitioner says, were not anticipated by the Court of Appeals. (Petition, pp. 15-17.) For example, it contends, shippers will no longer be able to maintain actions to recover past charges made by a carrier in excess of its tariffs, or to recover for damage to goods in transit, and persons injured by a motor car-

rier will no longer be able to maintain actions sounding in tort for their injuries. Notwithstanding petitioner's protestations, we may not assume that the "host of consequences" described follows necessarily from the holding in *T.I.M.E.* as applied by the court below and, more pertinently, we may not assume that any of these "consequences" are now before this Court. The Supreme Court, of course, does not decide hypothetical cases but rather limits its inquiry to the rights of persons or property actually controverted in the particular case before it.

> *Swift & Co. v. Hocking Valley Ry. Co.*, 243 U. S. 281, 289, 61 L. Ed. 722, 37 S. Ct. 287 (1917).
>
> *California v. San Pablo etc. Railroad*, 149 U. S. 308, 314, 37 L. Ed. 747, 13 S. Ct. 876 (1893).

See also:

> *Poe v. Ullman*, 367 U. S. 497, 6 L. Ed. 2d 989, 81 S. Ct. 1752 (1961).

Possibly anticipating petitioner's misconception of the scope of its ruling, the court below stated specifically that:

> "It is not necessary for us to decide, and we do not so decide, that no common law actions have survived the MCA, but where, as appellant recognized here, the real issue is whether or not the carrier has failed to provide service to a shipper on reasonable terms and without unjust discrimination, the District Court is without jurisdiction to hear and determine it." (Footnote omitted. 302 F. 2d at 394.)

Petitioner refers to the decison of the Second Circuit in *Hewitt-Robins v. Eastern Freightways*, 293 F. 2d

205 (2 Cir., 1961), cert. gr. 368 U. S. 951, 7 L. Ed. 2d 385, ... S. Ct. .... (1962), suggesting that a rule of law is being developed by the Courts of Appeal that would in effect enable a carrier to defeat jurisdiction of *any* claim for breach of its contract of carriage or for breach of its duties as a carrier by raising the issue of "reasonableness". (Petition, pp. 16-17.) By so doing petitioner ignores the very real distinction between *Hewitt-Robins* and the instant case. There, the claim is made that the question is not one of "reasonableness" at all, but of breach of an implicit contractual covenant. Therefore, the petitioner in that case argues, the preemption doctrine has no application. This Court has apparently granted certiorari to review that question. Here, as has been indicated, it is conceded that the ultimate question involved would be one of reasonableness in respect to the performance of a carrier's duties under the Motor Carrier Act.

Limiting our discussion, as we must, to the issues actually presented by the case, it becomes readily apparent that *T.I.M.E.* is controlling. Precisely the same subsections of Section 216 of the Motor Carrier Act are involved; the same standard of "reasonableness" must be applied and the same considerations of national transportation policy are presented. Although this Court in *T.I.M.E.* did not deal with these precise aspects of a carrier's duty, as the Court of Appeals noted, the rationale of *T.I.M.E.* is directly applicable here.

IV.

The Decision of the Court Below Does Not Conflict With the Authorities From Other Circuits Relied Upon by Petitioner.

Petitioner contends that the decision below conflicts with the following authorities:

Meier & Pohlman Furniture Co. v. Gibbons, 233 F. 2d 296 (8 Cir., 1956), cert. den. 352 U. S. 897, 1 L. Ed. 2d 80, 77 S. Ct. 101 (1956);

Minneapolis, etc. Railway Co. v. Pacific Gamble Robinson Co., 215 F. 2d 126 (8 Cir., 1954);

Merchandise Warehouse Company v. ABC Freight Forwarding Corp., 165 Fed. Supp. 67 (S. D. Ind., 1958);

Quaker State Motor Parts Co. v. Interstate Motor Freight System, 148 Fed. Supp. 226 (E. D. Pa., 1957).

Petitioner's reliance upon these authorities is misplaced for the following reasons:

First: All of these cases were decided prior to the decision of this Court in *T.I.M.E.*, and to the extent that they conflict with it must be deemed to be overruled.

Second: The absence of a legal right cognizable in the courts—the only question considered by the court below—was not passed upon in any of these cases. In *Meier & Pohlman Furniture Co., supra*, it does not appear that the jurisdiction of the court was questioned, and the formal finding of jurisdiction is supported by no citation of authority. In *Merchandise Warehouse Company, supra*, the court dealt directly with the merits of the case after noting that objections to jurisdiction had

been defectively presented. In *Quaker City Motor Parts Co., supra,* the parties were seeking the dissolution of a mandatory preliminary injunction and, as the court pointed out particularly:

> "None of the counsel for the original defendants, intervening defendants or *amicus curiae* have challenged the court's Conclusions of Law that common carriers such as these and their employees have an obligation to deliver goods shipped by them in interstate commerce which is enforceable by a mandatory injunction . . ." (148 Fed. Supp. at 228).

Finally, in *Minneapolis, etc., Railway Co.,* the carrier defendant was interstate railroad, not a motor carrier; its duty to serve was established by 49 U. S. C. Sections 1(3), 1(4) and 1(11), and the express statutory predicate for a private civil action for damages was, therefore, found in 49 U. S. C. Section 8.[4]

Third: None of these cases involving motor carriers considered the earlier holding of the Ninth Circuit in *Consolidated Freightways v. United Truck Lines, supra,* relied upon by the court below.

Fourth: These cases took no cognizance of and are clearly inconsistent with the intent of Congress, as disclosed by the legislative history of the Motor Carrier Act. *T.I.M.E v. United States, supra,* 359 U. S. at 470-71, see also: *Garner v. Teamsters C. & H. Union,* 346 U. S. 485, 98 L. Ed. 228, 242, 74 S. Ct. 161 (1953).

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[4]The existence of provisions for damages such as §8 in Parts I and III of the Interstate Commerce Act and the absence of comparable provisions in Part II is highly persuasive as to the Congressional intent in this regard. *T.I.M.E. v. United States, supra,* 359 U. S. at 470, 3 L. Ed. 2d at 957.

V.

The Case Presents No Important Undecided Questions of Federal Law.

Petitioner suggests that the instant case presents a number of important unsettled questions of federal law, all arising out of the broad question whether the Motor Carrier Act in effect clothed all federally certificated motor common carriers with immunity from court suits for damages of virtually any kind of restricting jurisdiction over such matters to the Interstate Commerce Commission, which has no power to award damages (Petition, p. 18). The fact that Congress provided for *administrative* enforcement of the Motor Carrier Act indicates that this is the type of enforcement deemed desirable. It did not, as petitioner implies, give shippers a right which in the absence of a judicial tribunal would be meaningless; rather, it created a specialized, technically qualified forum in which shippers' rights could be adjudicated and indicated by the deliberate exclusion of other remedies that the Interstate Commerce Commission would be the sole tribunal in which disputes arising under the Act would be litigated.

Petitioner has the right to petition the Interstate Commerce Commission for relief against a carrier's violation of the Act under Section 204(*c*) [49 U. S. C. §304(c)]. The Interstate Commerce Commission has access to the Federal courts for enforcement of the Act and of its rules promulgated thereunder, under Section 222(b) [49 U. S. C. §322(b)]. It is apparent that Congress intended that the Commission define the scope of a carrier's duty to provide reasonable and nondiscriminatory service, to determine whether because of compelling considerations it is to be relieved of its usual

statutory duty, and to settle these matters within the framework of the national transportation policy. *Local 1976, U. B. C. & J. v. N. L. R. B.*, 357 U. S. 93, 109, 110, 2 L. Ed. 2d 1186, 1200, 78 S. Ct. 1011 (1958).

The holding of the court below was, of course, limited to the issues before it. Those issues were decided, as we have indicated, not by the determination of hitherto unsettled questions of law but by reference to the clear holding of this Court in *T.I.M.E.* Whatever other questions—even important questions—may remain unsettled, this case is limited to the question above stated. And, as to this question, this Court has rendered its decision and the court below has merely followed it.

Respondents contended in the courts below, as an entirely separate and adequate basis for denial of jurisdiction, that the District Court lacked jurisdiction because it could not decide the case without reaching issues which the National Labor Relations Board has exclusive jurisdiction to resolve in the first instance. Petitioner does not refer to this contention, but does indicate that there lurks in this case a further question as to the extent of a carrier's duty to render service across a picket line at the shipper's place of business (Petition, pp. 10, 19). The court below did not find it necessary to pass upon either of these questions because of its conclusion that no private judicial remedy was available to the petitioner in any event. This being an entirely adequate basis for decision, it would be contrary to the well-settled practice of this Court to grant certiorari in order to take up a question of public law which was not considered or passed upon by the court below. *Cf. Barr v. Matteo*, 335 U. S. 171, 2 L. Ed. 2d 179, 78 S. Ct. 204 (1947); *Eccles v. People's Bank*, 333 U. S. 426, 92 L. Ed. 784, 68 S. Ct. 641 (1948).

Conclusion.

Petitioner apparently assumes that because a shipper has a qualified right under the Motor Carrier Act to be served, it therefore has a private judicial remedy for the vindication of that right in addition to the remedies before the Interstate Commerce Commission provided for in the Act. It cites no holding in support of this proposition, this Court has rejected it, and the intent of Congress to the contrary clearly appears from the legislative history of the Act. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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